84-535

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PAUL S. DAVIS,

Petitioner

v.

DONALD J. DEVINE, Director, Office of Personnel Management,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether Respondent's "policy" against the employment of civil service annuitants as administrative law judges violates the Age Discrimination in Employment Act?

(2) More specifically, whether the scope of the Age Discrimination in Employment Act must be restricted because of alleged inconsistency with otherwise applicable provisions of the civil service retirement laws?

(3) Whether Respondent, as a Government agency, is required in establishing policies to comply with the substantive standards of that Act, notwithstanding Petitioner's alleged failure to comply with procedural provisions, and whether Petitioner in fact failed to comply with such procedures?

(4) Whether 5 U.S.C. 3323(b), stating that a civil service annuitant serves at the will of the appointing authority, bars

the appointment of an annuitant as an administrative law judge, in view of the express provisions of 5 U.S.C. 7521, protecting administrative law judges from removal except for cause?

(5) Whether Respondent's asserted "policy" concerning annuitants can be considered controlling in the light of the repeated exceptions to that "policy" made by Respondent,under which many annuitants have in fact been reemployed as administrative law judges?

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PAUL S. DAVIS,

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v.

DONALD J. DEVINE, Director, Office of Personnel Management,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Paul S. Davis, Petitioner herein, a member of the Bar of this Court, appearing pro se, petitions this Court for a Writ of Certiorari directed to the United States Court of Appeals for the Sixth Circuit, to review the Judgment of that Court in the case of Davis v. Devine, filed on June 15, 1984.

OPINIONS BELOW

Davis v. Devine, 554 F.Supp. 1165 (U. S. District Court, W. D. Michigan; January 14, 1983).

Davis v. Devine, 736 F. 2d 1108 (Court of Appeals, 6th Circuit; June 15, 1984).

JURISDICTION

Petitioner seeks review of the Judgment of the United States Court of Appeals for the Sixth Circuit, filed on June 15, 1984. That Judgment affirmed the Judgment of the District Court of the United States for the Western District of Michigan, filed on January 14, 1983.

Rehearing was denied by the Court of Appeals on August 7, 1984.

This Court has jurisdiction to grant a writ of certiorari under 28 U. S. C. 1254(1).

STATUTES INVOLVED

Age Discrimination in Employment Act, 29 U.S.C. 633a, subsections (a), (d) and (e).

Civil Service Reform Act of 1978, 5 U.S.C. 2302(b)(1)(B).

Civil Service Statutes (Codification of Title 5, U.S. Code -- Government Organizations and Employees), as follows:

5 U.S.C. 3323(b) (as in force prior to March 2, 1984).

5 U.S.C. 7521.

The foregoing statutory provisions are set forth in the Appendix.

STATEMENT OF THE CASE

Petitioner is a lawyer and a former temporary administrative law judge. As a result of prior Government service Petitioner receives a civil service annuity, which commenced when he reached the age of 62.

Petitioner applied to the Civil Service Commission (predecessor of Respondent) for appointment as a permanent administrative law judge. After examination Petitioner was found to be fully qualified for this position, with an eligible rating of 84. Respondent placed Petitioner's name on the register of eligibles, but stated that he would not be certified pending resolution of the question before Respondent concerning the reemployment of annuitants.

For some years the Respondent and its predecessor agency have had a "policy" restricting the appointment of civil service annuitants as administrative law judges, on the theory that a provision in 5 U.S.C. 3323(b) with respect to service being "at the will of the appointing authority" constituted a potential impairment of the independence of the administrative

law judge. That "policy" was never set forth in Regulations nor in the published Announcement of the position. The Civil Service made many exceptions to this "policy."

With his application Petitioner submitted a letter urging his appointment, specifically taking the position that the "policy" against appointing annuitants violated the Age Discrimination in Employment Act. Following the enactment of the 1978 Amendments to that Act and the Civil Service Reform Act of 1978, while Petitioner's application was pending, Petitioner submitted a further letter, again urging that a "policy" barring annuitants constituted age discrimination. Both letters also presented other legal arguments.

Although Respondent's General Counsel advised Petitioner that the question concerning the appointment

of annuitants was being reexamined, the Respondent failed to make any change in its "policy," and took no further action on Petitioner's application. Petitioner thereafter filed his action in the United States District Court.

Federal Jurisdiction

Petitioner's action in the District Court was primarily an action in the nature of mandamus, based on an alleged failure by Respondent to perform a duty owed to Petitioner (under 28 U.S.C. 1361).

Petitioner's Complaint in the District Court also alleged jurisdiction under the Age Discrimination in Employment Act (29 U.S.C. 633a), as a case arising under the Constitution and laws of the United States (28 U.S.C. 1331), as an action involving civil rights (28 U.S.C. 1343(a)(4)), as an action involving a Federal agency (5 U.S.C. 701), and as a request for declaratory relief (28 U.S.C. 2801-02).

REASONS FOR GRANTING THE WRIT

The decision below seriously erodes the scope of the Age Discrimination in Employment Act and is in conflict with decisions of other Federal Courts. The case also presents important questions of public law, dealing with the selection of administrative law judges, which have not been, but should be, settled by this Court.

The Respondent's policy against appointing civil service annuitants as administrative law judges clearly constitutes an age discrimination. To receive a civil service retirement annuity a present or former Government employee must generally have reached the age of 62, or the age of 55 with 30 years of service, subject to some minor exceptions (5 U.S.C. 8336-38). Statistics in the record show that over 97% of

civil service annuitants are age 55 or over and that 86% are over age 59 (Joint Appendix in Court of Appeals, page 57).

A Government employee does not become an annuitant until he (or she) retires. Thus the effect of the policy barring civil service annuitants is to disqualify former Government employees when they become 62, or those who previously retired with specified service at age 55 or 60.

On the other hand, a Government employee with the same qualifications, who is still on the payroll at age 62, does not draw his annuity until he retires, and would therefore be eligible under Respondent's policy. Similarly a person who has never worked for the Government would be eligible. Thus the effect of Respondent's policy is to discriminate against a particular group of older individuals, consisting

of former Government employees over 62 (or in some cases over 55 or 60).

Respondent has taken the position that the scope of the Age Discrimination in Employment Act does not extend to permit alteration of the Civil Service Retirement Act or interpretations of the latter Act. A similar contention was made by Respondent in litigation involving disability annuitants in the case of Moysey v. Andrus, 481 F. Supp. 850 (D.C., D.C., 1979). In that case the Court held that the application of the Retirement Act, as administered by the Respondent, discriminated against older retirees and was therefore in violation of the Age Discrimination in Employment Act.

The Court below held that Petitioner could not rely on the Age Discrimination in Employment Act because of alleged failure to file a complaint with Respondent or a notice of intent to file suit, in

accordance with subsection (d) of 29 U.S.C. 633a. In fact, however, Petitioner in two different letters advised Respondent of his position with respect to the Age Discrimination in Employment Act. In Hinton v. Solomon, 475 F. Supp. 105 (D.C., D.C., 1979) the Court emphasized that the purpose of subsection (d) was to give the Civil Service Commission an opportunity to take corrective action. Petitioner fully exhausted his administrative remedies.

In any event, irrespective of the procedural provisions of the Age Discrimination in Employment Act, its substantive requirements are clearly applicable. Subsection (e) of 29 U.S.C. 633a, as well as 5 U.S.C. 2302(b)(1)(B), enacted as part of the Civil Service Reform Act of 1978, expressly require all Government agencies to assure nondiscrimination based on age.

The decision of the Court below is in conflict with that of the Court of Appeals for the Second Circuit in R.A. Holman & Co. v. Securities and Exchange Commission, 366 F. 2d 446 (1966). In that case the Court of Appeals sustained an order of the Securities and Exchange Commission in a case where the Hearing Examiner was a reemployed annuitant who had been remployed for five successive years. In the Holman case this Court denied certiorari (389 U.S. 991, 1060).

The Government Brief in Opposition to Certiorari in the Holman case took a very different position from that asserted by counsel for the Respondent in the present case. In opposing certiorari in that case the Acting Solicitor General stated that the status of a reemployed annuitant as a hearing examiner did not compromise his "independence," and that it was far-fetched

to assume that he would be vulnerable to improper pressures from the agency (Brief in Opposition, Docket No. 614 in this Court, October Term, 1967, page 17).

Respondent's "policy" against the appointment of annuitants as administrative law judges has clearly been treated as a practice or policy rather than as a settled statutory interpretation. The record shows that the Civil Service Commission made many exceptions to this policy and permitted agencies to reemploy annuitants (Joint Appendix in Court of Appeals, pages 37-40, 42-45). In a 1974 action the Commission stated that termination of reemployment would be subject to the protections of 5 U.S.C. 7521 (Joint Appendix, page 43). Thus in effect, where exceptions were made, the Commission did not permit the operation of the "at will" clause of 5 U.S.C. 3323(b).

In testimony before a House of Rep-

resentatives Subcommittee in June 1980, while Petitioner's application was pending before the Respondent, the Director of the Office of Administrative Law Judges of Respondent expressed the opinion that 5 U.S.C. 3323(b) did not necessarily impair decisional independence. He also stated that the subject was "under study" by his agency. */

The Opinion of the Court below refers to the Act of March 2, 1984 (Public Law 98-224), which amended 5 U.S.C. 3323(b). However, that law does not purport to be retroactive. In Greene v. United States, 376 U.S. 149 (1964), this Court held that statutes would be applied retroactively

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*/ Testimony of Marvin H. Morse, set forth in Hearing on the Administrative Law Judge Program, before the Subcommittee on Investigations of the Committee on Post Office and Civil Service, House of Representatives, 96th Congress, 2nd Session, June 17, 1980, page 23; included in Joint Appendix in Court of Appeals, page 60.

only if manifestly so intended (376 U.S. at page 160). This recent amendment was considered by the House of Representatives under a consent procedure, and it does not appear that Congress was advised of the issues in this litigation, which was then pending in the Court of Appeals (Congressional Record, November 16, 1983, page H 10017-18, and January 9, 1984, page S 1319). Accordingly the statutes must be applied in this case as in effect in 1981, when Petitioner filed his action.

In any event, the March 1984 Amendment did not change the language of the first sentence of 5 U.S.C. 3323(b), which states that an annuitant may be employed in any position "for which he is qualified." Refusal of such employment for a qualified annuitant clearly constitutes unlawful age discrimination, in violation of the Age Discrimination in Employment Act and the Civil Service Reform Act of 1978.

CONCLUSION

For the reasons above set forth, Petitioner submits that the decision of the Court below is in conflict with decisions of Federal Courts in other Circuits. The case presents important questions of Federal law, under the Age Discrimination in Employment Act and in the procedures for the selection of administrative law judges.

Accordingly Petitioner respectfully petitions the Court to grant a Writ of Certiorari directed to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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October 1984

APPENDIX A

No. 83-1110

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PAUL S. DAVIS, *Plaintiff-Appellant,* v. DONALD J. DEVINE, Director, Office of Personnel Management, *Defendant-Appellee.*	ON APPEAL from the United States District Court for the Western District of Michigan.

Decided and Filed June 15, 1984

Before: KEITH and KRUPANSKY, Circuit Judges; and REED, District Judge*

KRUPANSKY, Circuit Judge. Plaintiff-appellant Paul S. Davis (Davis) has appealed the entry of judgment in favor of defendant-appellee in this mandamus/age discrimination action.

This action commenced January 19, 1981 when Davis, a former federal employee who receives a civil service annuity, filed his complaint alleging that the defendant, Donald J. Devine, the Director of the Office of Personnel Management, had improperly refused to certify Davis as a candidate for a

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* Hon. Scott Reed, District Judge, United States District Court for the Eastern District of Kentucky, sitting by designation.

permanent position as an administrative law judge. The complaint, and Devine's decision not to certify Davis, invoked two federal laws: (1) 5 U.S.C. § 3323(b), which permits government reemployment of a civil service annuitant in any position "for which he is qualified", but which also mandates that the reemployed annuitant "serves at the will of the appointing authority"; and, (2) a provision of the Administrative Procedure Act (A.P.A.), 5 U.S.C. § 7521, which ensures that administrative law judges (a.l.j.) are removable only for cause. Davis sought a declaratory judgment, a mandamus order, and other relief. Specifically, he petitioned the court for an order and decree instructing the Office of Personnel Management (O.P.M.) to certify him to the register of administrative judges, and a declaratory judgment adjudging invalid O.P.M.'s policy against the employment of civil service annuitants as a.l.j.s. Cross-motions for summary judgment were filed and, on January 14, 1983, the district court granted O.P.M.'s motion. Davis then prosecuted this timely appeal.

Briefly, the factual events precipitating this lawsuit are as follows. Davis had voluntarily severed from federal service in May 1956, with annuity eligibility in 1971. Pursuant to the Civil Service Retirement Act, 5 U.S.C. § 8301 *et seq.*, he received and continues to receive an annuity reflecting his civilian and military employment by the federal government.

In June 1974, he was appointed to serve as a temporary administrative law judge with the Social Security Administration. His jurisdiction was limited to applications for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969. His initial one year appointment was subsequently extended. In 1977 Davis was informed that his term was not authorized for a further extension beyond June 30, 1977.

On March 10, 1977, he applied to the Civil Service Commission (the predecessor of O.P.M.) for appointment as an administrative law judge. The cover letter accompanying the application requested reconsideration of the Commission's

policy decision foreclosing appointment of annuitants as permanent administrative law judges. Davis asserted that the policy conflicted with the statute ensuring tenure to an a.l.j. and, that it also conflicted with the Age Discrimination in Employment Act.

On December 8, 1977, the Office of the Administrative Law Judges (O.A.L.J.), an O.P.M. agency responsible for management of the a.l.j. system, notified Davis that he had not qualified for the GS-15 level a.l.j. position. In January, 1978, Davis filed an F.O.I.A. request for documents relative to this decision. The documents were disclosed to Davis and, subsequently, the O.A.L.J. elected to reconsider Davis's application.

Upon reconsideration, the O.A.L.J. reaffirmed its original determination and Davis petitioned for review by O.P.M.'s appeal review board. The appellate review board reversed the O.A.L.J. and Davis was certified as having the minimum qualifications for the a.l.j. position. The review board, however, declined to speculate on the propriety of appointing an annuitant to a position from which an appointee was removable only for cause. The matter was therefore returned to the O.A.L.J. for "determination by that office regarding . . . possible ineligibility based on annuitant status".

The O.A.L.J. referred the issue to the agency's General Counsel for an opinion. On August 14, 1979, the O.A.L.J. informed Davis that he had obtained an eligible rating for the a.l.j. position, that his name was being placed on the register of eligible a.l.j.s, but that he would not be certified to any agency desirous of employing an a.l.j. until the General Counsel resolved the annuity issue. No formal ruling was ever issued, but O.P.M. has conceded that Davis "was informally advised that the General Counsel had declined to recommend any change in the agency position that annuitants were ineligible for appointment". Brief for O.P.M., at 6. The within action ensued.

The district judge granted the government's motion for judgment on the pleadings, having concluded that the O.P.M. "interpretation of 5 U.S.C. §§ 3323(b) and 7521 . . . should be upheld".

The court also rejected Davis's reliance on 5 U.S.C. § 559 of the A.P.A., which mandated that no subsequent statute should be held to modify the A.P.A. unless "it does so expressly". The judge below noted that, while § 3323(b) providing for the removal of annuitants at the will of the agency was enacted subsequent to the A.P.A. provision in § 7521 granting good cause tenure to a.l.j.s, the two provisions were not necessarily in discord. The district court noted that § 3323(b) was intended "to increase the opportunities for [annuitant] reemployment subject to the condition that it be on an at-will basis",[1] while "[t]he purpose of § 7521 is to give A.L.J.s . . . independence and tenure rights that insulate them from possible agency influence or control". The lower court concluded that, "[i]f plaintiff were to be given a normal A.L.J. appointment, removable only for cause, the provision of § 3323(b) that the annuitant serve only at 'the will of the appointing authority' would be violated. If plaintiff were to be appointed to serve at will, then the protections of § 7521 and the independence it strives to assure would be lost".

The lower court held that O.P.M.'s interpretation that annuitants are not eligible for appointment to permanent administrative law judge positions effectuated the intent of both congressional enactments implicated by the complaint. According judicial deference to the agency's reasonable construction of statutes it is charged with enforcing, the district judge upheld the O.P.M. policy as not in derogation of the law.

Addressing Davis's age discrimination claim, the court concluded that his admitted failure to comply with the statutory

[1] Prior to the passage of the at-will provision of § 3323 in 1956, civil service annuitants were generally barred from federal reemployment after age 60.

prerequisite of an A.D.E.A. suit by filing a complaint or notice of intent to sue prior to instituting the lawsuit barred the action. The district judge thereby rejected Davis's assertion that letters he sent to the Commission with respect to his application met the statutory demands. The judge below held that "the letters are far from being explicit enough to charge the Commission with knowledge of an intent to bring an action under the A.D.E.A." and, that it "is not at all inequitable to require plaintiff, an attorney, to comply with the clear statutory mandate".

Finally, the district judge dismissed Davis's argument that past policies respecting limited reemployment of annuitant a.l.j.s established the impropriety of the current policy. Those past policies were discerned to have provided extraordinary measures for emergency situations whereunder an a.l.j. retires with a case backlog; the policy in such circumstances was to authorize temporary reappointment of the retired a.l.j. to permit completion of the cases on the docket.

On appeal, Davis has challenged the district court's legal conclusions in each of the above holdings.

Primarily, Davis has challenged the propriety of the O.P.M. interpretation of statutory provisions relative to civil service employment and reemployment. Therefore, the appellate issue is whether the O.P.M.'s interpretation of the statutes is reasonable. *See generally Weinberger* v. *Salfi*, 427 U.S. 749, 777, 95 S.Ct. 2457, 2472-73 (1975); *Udall* v. *Tallman*, 380 U.S. 1 (1965); *Young* v. *T.V.A.*, 606 F.2d 143, 145 (6th Cir. 1979) *cert. denied*, 445 U.S. 942 (1980). As stated by Judge Weick writing for the Sixth Circuit in *Young* v. *T.V.A.*:

> In considering the legality of agency action under an enabling statute, we do not write on a clean slate. Ordinarily, a court should give great weight to the frequent, consistent, and long standing construction of a statute by an agency charged with its administration. Particularly this is true with respect to a statute which is reasonably susceptible of two different interpretations. The

> construction of a statute by those agencies charged with its execution should be followed unless there are compelling indications that it is wrong. . . .

606 F.2d at 145 (citations deleted). To sustain the agency's interpretation, the court "need not find that its construction is the *only* reasonable one", *Udall* v. *Tallman*, *supra*, 380 U.S. at 16 (emphasis supplied), but only that it is a reasonable and not a compelling incorrect interpretation. *See, e.g., id; Young* v. *T.V.A., supra.* Moreover, insofar as this action has involved two separate congressional enactments which appear to intersect and, potentially, conflict, it is important to note that the prescribed rule of statutory construction is that the court must labor to permit the survival of both enactments if possible. *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974) (quoting *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939)).

Prior to the 1956 enactment of 5 U.S.C. § 3323(b), civil service annuitants were largely barred from reemployment by the federal government.[2] As relevant to this appeal, § 3323(b) stated:

> Notwithstanding other statutes, an annuitant . . . is not barred by reason of his retired status from employment in an appointive position for which he is qualified. An annuitant so reemployed serves at the will of the appointing authority.

Under the applicable version of § 3323(b), then, the "at will" annuitant may be discharged for no reason, or for less than good cause. *See generally Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886 (1967).

Pursuant to § 7521 of the A.P.A. (enacted June 10, 1946), an administrative law judge can be removed "for good cause

[2] From 1926 to 1948, annuitants were *absolutely* barred from reemployment. In 1948, the bar was qualified to permit reemployment under restrictive circumstances. The 1956 Act, therefore, represents a quantum expansion of the reemployment prospects for civil retirees.

established" and is entitled to a hearing on the record. By protecting the tenure of the a.l.j. in this manner, Congress obviously intended to insulate and protect the judges from agency influence and manipulation. *See Ramspeck* v. *Federal Trial Examiners Conference*, 345 U.S. 128 (1953).

O.P.M. has urged that § 3323(b) and 7521 together pretermit the eligibility of annuitants for permanent a.l.j. positions. Contrarily, Davis has reiterated his argument, presented below, that the § 3323(b) mandate permitting reemployment of an annuitant in any position "for which he is qualified" permits the appointment of annuitants to an a.l.j. post. Thereafter, Davis has argued, the "for cause" provision of the A.P.A. would act to obviate the second sentence of § 3323(b), which qualifies the character of the annuitant-appointee's employment as one "at will".

Davis has divined support for his theory in the A.P.A.'s stricture that no subsequent statute may be held to supercede, modify, or undermine its provisions "except to the extent that such legislation shall do so expressly". 5 U.S.C. § 559. Thus, Davis has urged, because the "at will" provision of § 3323(b) antedates the A.P.A. "for cause" provision, it must be concluded, *per* § 559, that annuitants may be appointed to permanent a.l.j. positions subject only to removal for cause.

The O.P.M.'s response is more cogent. Under § 3323(b) the threshold issue, according to the O.P.M., is whether Davis is qualified for a permanent a.l.j. position. Because § 3323(b) restricts the nature of Davis's reemployment rights to "removable at will" positions and, because the A.P.A. mandates a.l.j.s be removable only for cause, Davis, as an annuitant, is *not qualified* for appointment to the permanent a.l.j. position. The district court persuasively reasoned that O.P.M.'s interpretation was legitimate insofar as it gave full effect to § 3323 (b) *and* § 7521.

Davis' view, on the other hand, would amount to a repeal of the stipulation in § 3323(b) that annuitants are subject to "at will" dismissal.

Review of the predecessor enactments to § 3323(b) lends support to the O.P.M. construction. As previously noted (see n.2), civil service annuitants were at one time absolutely precluded from federal reemployment. Subsequent enactments gradually removed restrictions on their reappointment, the most recent being the one now under review. In view of the history of an evolutionary and purposeful legislative expansion of an annuitant's federal reemployment opportunity, the language of § 3323(b) limiting annuitant reappointment to service at will must be viewed as a continuation and remnant of the long standing disabilities imposed on the reemployment opportunity of federal retirees. Congress has made the decision to perpetuate this qualification and Davis's attempt to utilize the qualification to create a "conflict" with the A.P.A. removal provision, and thus obviate the § 3323(b) limitation itself, is a perversion of the limited reemployment rights granted annuitants. Accession to Davis's argument would be an unwarranted judicial expansion of an intentionally restricted congressional enactment.

Recent legislative activity surrounding § 3323(b) of Title 5 also tends to support the interpretation advanced by O.P.M.. In 1980, the Congress was made aware of the potential interpretive conflict between the civil service and administrative procedure acts. The House Committee on Post Office and Civil Service reported bill No. H.R. 6768 to the entire house. The bill would have removed the disability imposed on the reappointment of civil service annuitants to tenured a.l.j. posts. *See* H.R. No. 96-1186, 96th Cong., 2d Sess. 2-4 (1980). The Committee had been tendered O.P.M.'s interpretation of § 3323(b). *See* Hearings Before the Subcommittee on Investigations of the Committee on Post Office and Civil Service, House of Representatives, 96th Cong., 2d Sess. 26, 37 (1980). H.R. 6768 failed for lack of congressional action.

Subsequently, on March 2, 1984, the Congress amended § 3323 by retaining the "at will" provision, but expanding the opportunity for reappointment of former administrative

judges, for definite terms, excepting them from the "at will" restrictions.

It is, of course, well settled that the views of subsequent congressional sessions are not reflective of the appropriate interpretation of statutes enacted by an earlier assembly of law makers. *E.g., United States* v. *Wise*, 370 U.S. 405, 82 S.Ct. 1354, 8 L.Ed.2d 590 (1962). However, when an agency alerts the Congress of its statutory interpretation of existing legislation, and the legislature does not alter the tendered interpretation when provided the opportunity to do so, then courts must presume that the agency has correctly discerned the legislative intent. *See generally North Haven Board of Education* v. *Bell*, 456 U.S. 512, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982). The congressional failure to amend § 3323 to remove the bar raised by O.P.M.'s construction, and the subsequent decision to *partially* remove that restriction, is certain evidence that the Congress is in accord with the O.P.M. view and is desirous of maintaining the restriction.

The district court accorded O.P.M.'s interpretation the appropriate deference because O.P.M.'s view of § 3323(b) is facially reasonable, does not contravene the purposes of any other statute, and there are no "compelling indications that it is wrong". Accordingly, the construction of § 3323(b) adopted by the district court must be affirmed.

Davis has also challenged the lower court's conclusion that his age claim was statutorily barred for failure to give prior notice. He has urged that he advanced a conflict between the O.P.M. policy and the A.D.E.A. in his initial application letters. This, he has argued, should have been sufficient to communicate a possible A.D.E.A. violation and thus satisfy the notice requirement of the Act.

The A.D.E.A. requires an individual complaining of age discrimination in federal employment to file an administrative complaint with the employing agency. 29 U.S.C. § 633a(d). The district court held that Davis's claim that the O.P.M. policy violated the A.D.E.A. was barred because his letters to

the O.P.M. in connection with his application were insufficient "to charge [O.P.M.] with knowledge of an intent to bring an action under the A.D.A.".

While Davis's letters to the agency referred to a possible conflict between the agency's policy and the A.D.E.A., they did not state a complaint of age discrimination. The letters served only to initiate Davis's application. Therefore, at the time the letters were sent he could not have notified the agency of a cause of action, namely, the rejection of his application, which only arose subsequent to his letters. Additionally, as noted by the district court, it would not be iniquitous to enforce the specific notice requirements of the Act against Davis, an attorney.

Finally, a decision that the annuitant appointment policy violates the A.D.E.A., after determining that the policy was a reasonable construction of statutory enactments, would require a finding that Congress implicitly intended the A.D.E.A. to repeal § 3323(b) of Title 5. Such repeals by implication are not favored. *T.V.A.* v. *Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). Instead, the "intention . . . to repeal 'must be clear and manifest.'" *Morton* v. *Mancari*, 417 U.S. at 551 (quoting *United States* v. *Borden, supra*). Relevantly, when it passed the A.D.E.A., Congress explicitly repealed only two statutes (5 U.S.C. § 3322 which limited federal employment of persons over 70 to temporary positions; and 5 U.S.C. § 8335, which provided mandatory retirement at age 70), which supports an inference that other federal employment acts were not intended to be repealed. Therefore, the O.P.M. is entitled to the presumption that § 3323(b) remains a valid enactment and that the agency's reasonable interpretation of the statute is not violative of the A.D.E.A.

Consistent with the foregoing, the district court's well-reasoned decision is hereby AFFIRMED. Each party will bear its own costs on the appeal.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 83-1110

PAUL S. DAVIS, Plaintiff-Appellant

v.

DONALD J. DEVINE, Director, Office of Personnel Management,
Defendant-Appellee

Before: KEITH and KRUPANSKY, Circuit Judges; and REED, District Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Western District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

(Judgment of Court of Appeals, continued)

Each party will bear it own costs on appeal.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

FILED June 15, 1984

Issued as Mandate: August 15, 1984

Paul S. DAVIS, Plaintiff,

v.

Donald J. DEVINE, Director, Office of Personnel Management, Defendant.

No. G81-25 CA.

United States District Court,
W.D. Michigan, S.D.

Jan. 14, 1983.

OPINION

BENJAMIN F. GIBSON, District Judge.

This is an action challenging the defendant's refusal to certify plaintiff as a candidate for permanent employment as an administrative law judge (ALJ). Plaintiff is an attorney who has served as a temporary ALJ in the past. Defendant is the Director of the Office of Personnel Management, which is responsible for administering the federal retirement system and hiring administrative law judges. Presently before the Court are plaintiff's motion for summary judgment and defendant's motion for judgment on the pleadings.

Plaintiff receives a civil service annuity as a result of his prior service with the federal government. The Civil Service Retirement Act provides that an annuitant "is not barred by reason of his retired status from reemployment in an appointive position for which he is qualified," but a reemployed annuitant serves only "at the

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will of the appointing authority." 5 U.S.C. § 3323(b).[1] The Administrative Procedure Act provides that an ALJ may be removed only for "good cause" established and determined by the Merit Systems Protection Board, after opportunity for hearing before the Board. 5 U.S.C. § 7521.[2] Defendant has interpreted these provisions as barring plaintiff, an annuitant who may serve only at the will of the appointing authority, from serving as an ALJ, who is removable only for good cause.

1. The text of 5 U.S.C. § 3323(b) is as follows:

> Notwithstanding other statutes, an annuitant as defined by section 8331 of this title receiving annuity from the Civil Service Retirement and Disability Fund is not barred by reason of his retired status from employment in an appointive position for which he is qualified. An annuitant so reemployed serves at the will of the appointing authority.

2. The text of 5 U.S.C. § 7521 is as follows:

> (a) An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.
>
> (b) The actions covered by this section are—
>
> (1) a removal;
> (2) a suspension;
> (3) a reduction in grade;
> (4) a furlough of 30 days or less;
>
> but do not include—
>
> (A) a suspension or removal under section 7532 of this title;
>
> (B) a reduction-in-force action under section 3502 of this title; or
>
> (C) any action initiated under section 1206 of this title.

Thus, plaintiff was not certified as an ALJ candidate because of his status as an annuitant. Plaintiff contends that defendant's interpretation is legally incorrect as a matter of statutory construction, that its policy of applying that interpretation constitutes unlawful age discrimination, and that the failure to uniformly apply such policy demonstrates that the interpretation is incorrect.

I. STATUTORY CONSTRUCTION

[1] First, plaintiff asserts that the provision relating to ALJs in § 7521 overrides the provision concerning reemployment of annuitants in § 3323. Since there are fewer ALJs than civil service annuitants, plaintiff argues that § 7521 is more specific and that under established principles of statutory construction the more specific statute controls over the more general statute. The Court disagrees. In addition to the fact that the group with which we are concerned is civil service annuitants seeking reemployment, rather than civil service annuitants in general, the principle does not apply here because the two statutes deal with different subjects. The ALJ statute is not appropriately described as dealing "with a part of the same subject in a more detailed way." *See* C. Sands, 2A Statutes and Statutory Construction § 51.05 (4th ed. 1973). The areas affected by the two statutes are capable of partial intersection, but neither area is entirely a subset of the other; it appears that there are relatively

large numbers of non-annuitant ALJs and relatively large numbers of annuitants reemployed in positions other than as ALJs.

[2] Plaintiff also argues that § 7521 should control because it is part of the Administrative Procedure Act (A.P.A.), which provides that no subsequent statute should be held to supersede or modify its provisions, "except to the extent that it does so expressly." 5 U.S.C. § 559. Since the law contained no provision that an annuitant serve at the will of the appointing authority when the A.P.A. was enacted in 1946, it is argued, § 3323(b) is a subsequent statute which should not be construed to apply to ALJs, who may be removed only for cause after a hearing under § 7521. However, if the two provisions are capable of being harmonized, then the subsequent statute is not in conflict with the earlier one and need not be controlled by it. As the Supreme Court has emphasized, "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974).

[3] An examination of the statutory language and purposes of §§ 3323(b) and 7521 demonstrates that they are indeed capable of co-existence. In enacting § 3323(b), Congress quite clearly intended that annuitants could be reemployed in po-

sitions for which they were qualified, but that they must serve at the will of the appointing authority. Prior law had provided that no annuitant could be reappointed after age 60 unless the appointing authority determined that he had special qualifications, and before that no annuitant could be reemployed at all.[3] Thus, the purpose of § 3323(b) was to increase the opportunities for reemployment subject to the condition that it be on an at-will basis. Under § 7521, an ALJ can suffer an adverse action only for good cause established and determined by the Merit Systems Protection Board after a hearing.[4] The purpose of § 7521 is to give ALJs (formerly "hearing examiners") independence and tenure rights that insulate them from possible agency influence or control. *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 131–32, 73 S.Ct. 570, 573, 97 L.Ed. 872 (1953). It follows from the explicit at-will limitation on reemployment of annuitants that annuitants cannot serve in appointive positions which are statutorily protected by a higher standard of good cause for removal.

3. *See* Act of January 24, 1942, 56 Stat. 15, S.Rep. No. 2642 on H.R. 7619, [1956] U.S.Code Cong. & Ad.News 3736; Act of May 29, 1930, § 2, 46 Stat. 470.

4. Compare the standard for adverse actions against civil servants generally, which is "such cause as will promote the efficiency of the service." 5 U.S.C. § 7513. The determination is made by the employing agency, with appeal to the Merit Systems Protection Board.

Plaintiff's attempt to be hired as an ALJ, if successful, would necessarily nullify one or the other of the two statutes. If plaintiff were to be given a normal ALJ appointment, removable only for cause, the provision of § 3323(b) that the annuitant serve only "at the will of the appointing authority" would be violated. If plaintiff were to be appointed to serve at will, then the protections of § 7521 and the independence it strives to assure would be lost.

[4] In contrast, defendant's interpretation carries out the Congressional intent of both statutes. It is entitled to deference by the courts, inasmuch as it constitutes the construction of a statute by the agency charged with its administration. *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1975). Moreover, in 1980 Congress held hearings related to defendant's interpretation and declined to approve a proposed amendment to § 3323(b) which would exclude annuitants reemployed as ALJs.[5] As the Court of Appeals for the Sixth Circuit said in *Young v. TVA*, 606 F.2d 143, 145 (1979), *cert. denied*, 445 U.S. 942, 100 S.Ct. 1337, 63 L.Ed.2d 776 (1980):

> The construction of a statute by those agencies charged with its execution should be followed unless there are compelling indications that it is wrong, espe-

5. *See* Hearings before the Subcommittee on Investigations of the Committee on Post Office and Civil Service, House of Representatives, 96th Cong., 2d Sess. 21–25 (1980); H.Rep. No. 96–1186, 96th Cong., 2d Sess. 4 (1980).

> cially when Congress with knowledge of the facts has consistently taken no steps to prohibit or curtail the administrative actions; but has approved them.

In this case Congress "has taken no steps to prohibit or curtail" defendant's administrative actions, despite an opportunity to do so, nor are there "compelling indications" that defendant's construction is wrong.

[5] Plaintiff contends that defendant's interpretation violates the merit selection principles of 5 U.S.C. §§ 2301–02. However, those provisions simply restate the general principles of selection and advancement on the basis of merit, rather than for extraneous or discriminatory reasons such as race or sex, and exhort federal personnel managers to act accordingly. Defendant's interpretation of the two statutes in issue means that plaintiff, as an annuitant employable only at will, is not qualified to be reemployed for a position where Congress has by statute declared that the occupant of the position must be removable only for cause. Plaintiff's rejection as not qualified by reason of his annuitant status is not a rejection on the basis of a prohibited "nonmerit" factor; it is a determination that he lacks a statutory qualification for the job. To the extent that plaintiff's claim is one of discrimination on the basis of age, 5 U.S.C. § 2302(b)(1)(B) calls for the application of the Age Discrimination in Employment Act of 1967 (A.D.E.A.), 29 U.S.C. § 621 *et seq.*, as amended, which the Court will address next.

The Court finds that defendant's interpretation of 5 U.S.C. §§ 3323(b) and 7521 is consistent with the statutory language and purpose, and should not be overturned on the basis of principles of statutory construction.

II. AGE DISCRIMINATION

Plaintiff contends that the application to him of defendant's statutory interpretation results in unlawful age discrimination under the A.D.E.A. Plaintiff argues that since the vast majority of civil service annuitants are over forty years of age,[6] the effect of defendant's policy is discrimination against a protected group—former government employees at or approaching an advanced age. Defendant responds that plaintiff has failed to comply with the jurisdictional prerequisites of a claim under the A.D.E.A.

The A.D.E.A. requires as a prerequisite to a civil action either the filing of a complaint with the Civil Service Commission or the giving of not less than thirty days' notice to the Commission of an intent to file such action. 29 U.S.C. § 633a(d). As the court said in *Hinton v. Solomon*, 475 F.Supp. 105, 108 (D.D.C.1979), "It is clear that the re-

6. Former government employees with at least five years of service can become civil service annuitants at age 62; with 20 years of service, at age 60; and with 30 years of service, at age 55. 5 U.S.C. §§ 8336, 8338. It is possible to become an annuitant before age 40, on a disability retirement with 5 years of service, 5 U.S.C. § 8337, but it is relatively rare. According to plaintiff's statistics, even among disability annuitants there are less than two percent who are under age 40.

quirements of section 633a(d) are jurisdictional in nature." *See also, Bunch v. United States*, 548 F.2d 336, 340 (9th Cir.1977).

Plaintiff contends that he did comply with the terms of § 633a(d) by virtue of two letters which raised the issue of age discrimination under the Act. In a letter of March 10, 1977 to the Civil Service Commission, plaintiff requested that the Commission give further consideration to its past policy against the appointment of civil service annuitants as ALJs and determine that plaintiff's annuitant status was not a legal barrier to his appointment as an ALJ. He supported his request with many of the legal arguments he raises in this Court, including the argument that § 3323 should be construed in a manner that avoids the alleged age discrimination caused by the Commission's past policy. In a letter of February 7, 1979 to the Acting Director of the Office of Administrative Law Judges of the Office of Personnel Management, plaintiff reiterated his position. Neither letter said a word about any plans to bring a civil action under the A.D.E.A.; they simply sought administrative reconsideration of past policy.

[6, 7] It is undisputed that plaintiff did not file an administrative complaint of age discrimination. In such circumstances, the statute clearly and unequivocally requires the filing of notice of intent to sue. Plaintiff's letters cannot be considered sufficient to satisfy this statutory prerequisite. Although with hindsight one might surmise

the existence of an inchoate intent to sue at that point, the letters are far from being explicit enough to charge the Commission with knowledge of an intent to bring an action under the A.D.E.A. It is not at all inequitable to require plaintiff, an attorney, to comply with the clear statutory mandate of 29 U.S.C. § 633a(d). The Court finds that plaintiff has failed to comply with the statutory prerequisite for a claim under the A.D.E.A.

[8] Plaintiff submits that this Court may properly grant relief for age discrimination under its mandamus jurisdiction, 28 U.S.C. § 1361, and the Civil Service Reform Act, 5 U.S.C. § 2301. However, plaintiff has failed to show that the extraordinary remedy of mandamus is warranted in this case. Moreover, it has repeatedly been held that the A.D.E.A. provides the exclusive remedy for age discrimination in suits by federal employees. *Purtill v. Harris*, 658 F.2d 134 (3d Cir.1981) (affirming dismissal of fifth amendment claim); *see also* cases cited therein.

The Court concludes that plaintiff has failed to present a valid claim of age discrimination under the A.D.E.A.[7]

7. If it were to reach the merits of plaintiff's claim of age discrimination, the Court notes that even though it may be difficult to conceive of a non-discriminatory purpose to § 3323(b), there would be substantial questions about plaintiff's right to relief. 29 U.S.C. § 623(f)

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III: PAST PRACTICE

Finally, plaintiff argues that the Civil Service Commission's past practice of recognizing exceptions to the policy of refusing to rehire annuitants as ALJs demonstrates that there is no statutory or jurisdictional bar to the reemployment of annuitants as ALJs. The exceptions to which plaintiff refers were made pursuant to a policy adopted at a meeting of the Commission on December 20, 1974. The minutes of that proceeding are, in pertinent part, as follows:

> [R]etirements by ALJ's with undecided cases which cannot be reassigned for a decision without rehearing have an adverse effect on the public interest and the agencies. In view of the foregoing, the Commission will permit the re-employment of annuitant ALJ's in order to conclude undecided cases in the following circumstances:
>
> 1—The request of the agency or department establishing a compelling need for re-employment in the public interest;
>
> 2—A statement in the request indicating that the case (or cases) cannot be reas-

specifically exempts retirement plans from A.D.E.A. claims, with certain limitations. In *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir.1974), it was held that this subsection exempted a private employer from having to rehire a retired employee, under a provision similar to 5 U.S.C. § 3323(b). It has been held that Congress intended the principles of § 623(f) to be applicable to the federal government. *Mason v. Lister*, 562 F.2d 343 (5th Cir. 1977).

signed for a decision without rehearing; 3—That the ALJ's retirement was not anticipated when the case(s) was initially assigned.

The Commission will permit the re-employment of the annuitant ALJ for a period not in excess of one year, or the completion of the case(s) on his docket at the time of retirement, whichever is shorter. The re-employed annuitant will work only on cases which were pending before him at the time he retired. Termination by the agency of re-employment for reasons other than the completion of the cases will be subject to the provisions of section 7521 of title 5, United States Code.

It is undisputed that plaintiff does not qualify under these criteria. Rather, plaintiff contends that if defendant's interpretation of § 3323(b) that an annuitant must serve at will is correct, then the Commission could not properly have conditioned its authorizations of reemployment on making termination "subject to the provisions of section 7521." Since the Commission did so condition its authorizations, it is implied, defendant's interpretation of § 3323(b) must be incorrect.

[9] However, the Court is not faced with the question of whether or not the exceptions authorized by the Commission's 1974 Minute were valid under the statute. The issue in this case is whether or not

defendant's general interpretation of §§ 3323(b) and 7521 is valid. The exceptions dealt with extraordinary or emergency situations under strictly limited conditions. The Commission's successor agency, the defendant, is not required by such past exceptions in limited circumstances for compelling need to totally abandon its general interpretation of §§ 3323(b) and 7521 and create a wholesale exception for all annuitant applicants for ALJ positions. Nor is the Court required to strike down the defendant's general interpretation on the basis of a past practice of providing such limited exceptions. *See Baker v. United States*, 614 F.2d 263, 267, 212 Ct.Cl. 263 (1980).

For the reasons stated above, the Court concludes that defendant's interpretation of 5 U.S.C. §§ 3323(b) and 7521, barring the reemployment of annuitants as permanent ALJs, should be upheld. Defendant's motion for judgment on the pleadings is therefore granted.

APPENDIX D

United States District Court
Western District of Michigan
Southern Division

Paul S. Davis, Plaintiff v. Donald J. Devine, Director, Office of Personnel Management, Defendant. No. G81-25 CA5

JUDGMENT

Entered January 14, 1983

In accordance the Opinion dated January 14, 1983, IT IS HEREBY ORDERED that plaintiff's motion for summary judgment is denied, that defendant's motion for judgment on the pleadings is granted, and that judgment is hereby entered in favor of defendant.

IT IS SO ORDERED.

BENJAMIN F. GIBSON

United States District Judge

APPENDIX E

FILED

August 7,1984

No. 83-1110

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PAUL S. DAVIS, Plaintiff-Appellant

v.

DONALD J. DEVINE,Director, Office of Personnel Management,
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

BEFORE: KEITH and KRUPANSKY, Circuit Judges; and REED, District Judge.

Appellant has petitioned the court for a rehearing of the decision entered in this case on June 15, 1984. Upon examination of the opinion of the court and consideration of the petition, the court is assured that no facts or law were misapprehended in the June 15, 1984 decision.

Therefore, the petition for rehearing is denied.

§ 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

****

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a

notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

CIVIL SERVICE REFORM ACT OF 1978

5 U.S.C.2302(b)(1)(B)

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) discriminate for or against any employee or applicant for employment—

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

Section 3323(b), as in effect prior to March 3, 1984

(b) Notwithstanding other statutes, an annuitant as defined by section 8331 of this title receiving annuity from the Civil Service Retirement and Disability Fund is not barred by reason of his retired status from employment in an appointive position for which he is qualified. An annuitant so reemployed serves at the will of the appointing authority.

Section 7521

§ 7521. Actions against administrative law judges

(a) An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

(b) The actions covered by this section are—

(1) a removal;

(2) a suspension;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but do not include—

(A) a suspension or removal under section 7532 of this title;

(B) a reduction-in-force action under section 3502 of this title; or

(C) any action initiated under section 1206 of this title.